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Nos. 02-241 and 02-516

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In The
Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

v.

LEE BOLLINGER, *et al.*,

Respondents.

JENNIFER GRATZ, *et al.*,

Petitioners,

v.

LEE BOLLINGER, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF AMICUS CURIAE THE MICHIGAN ASSOCIATION OF SCHOLARS IN SUPPORT OF PETITIONERS

WILLIAM F. MOHRMAN
Counsel of Record
ERIC L. LIPMAN
MOHRMAN & KAARDAL, P.A.
33 South Sixth Street, Suite 4100
Minneapolis, MN 55402
(612) 341-1074
Counsel for Amicus Curiae

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OR CALL COLLECT (402) 342-2831

28 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

STATEMENT 2

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. CREATING A DIVERSE STUDENT BODY CAN NEVER BE A COMPELLING STATE INTEREST 4

A. State Interest Is "Compelling" When the Furtherance of that Interest Protects Those Principles Which Lie at the Heart of Ensuring Our Nation Stays Free, Open and Democratic Governed Under the Rule of Law 4

B. Government Mandated Racial Diversity Can Never Be a Compelling State Interest Under the Equal Protection Clause 8

II. EVEN IF THE CLAIMS OF THE UNIVERSITY FOR THE VALUE OF RACIAL DIVERSITY HAD SOME MERIT, SUCH DIVERSITY DOES NOT CONSTITUTE A COMPELLING DEMAND UPON THE STATE 11

A. A Student's Race Contributes Nothing to the University's Pursuit of Truth 11

B. The Rationale Proffered by the Law School Is Internally Inconsistent 13

TABLE OF CONTENTS – Continued

Page

C. The University Has Not Sustained Its Evidentiary Burden of Establishing that Its Interest in Racial Diversity Is *Compelling* 15

III. "ACADEMIC FREEDOM," CANNOT SERVE AS A SWORD TO ENGAGE IN OUTRIGHT DISCRIMINATION BY RACE IN UNIVERSITY ADMISSIONS 17

IV. THE UNIVERSITY'S USE OF RACE AND ETHNICITY IN THE ADMISSIONS PROCESS IS IMMORAL 19

V. THE UNIVERSITY'S USE OF RACE AND ETHNICITY IN THE ADMISSIONS PROCESS ENGENDERS RACIAL TENSION AND HOSTILITY 21

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES

Adarand Constructors v. Pena, 515 U.S. 200, 115 S.Ct. 2097 (1995) 9, 22

Brown v. Board of Educ., 347 U.S. 483 (1954) 8, 20

Burson v. Freeman, 504 U.S. 191 (1992) 6

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 6

Gratz v. Bollinger, 122 F. Supp.2d 811 (E.D. Mich. 2000) 2

Grutter v. Bollinger, 137 F. Supp.2d 821 (E.D. Mich. 2001) 2, 13, 14

Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002) 3, 13

Hirabayashi v. United States, 320 U.S. 81, 63 S.Ct. 1375 (1943) 8

Keyishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675 (1967) 18

Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) 9

Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817 (1967) 8, 9

Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547 (1990) 9

New York Times Co. v. U. S., 403 U.S. 713 (1971) 7

Palmore v. Sidoti, 466 U.S. 429, 104 S.Ct. 1879 (1984) 8

Quilter v. Voinovich, 912 F.Supp. 1006 (N.D. Ohio 1995) (dicta) (reversed on other grounds) 5

TABLE OF AUTHORITIES – Continued

Page

Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).....3, 8, 17

Shaw v. Reno, 113 S.Ct. 2816 (1993)..... 8

Sweezy v. New Hampshire, 354 U.S. 234 (1957).....18

Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040 (1976)..... 8

OTHER AUTHORITIES

H. Holzer and D. Neumark, Assessing Affirmative Action, *Journal of Economic Literature*, Vol. 38, No. 3 (Sept. 2000).....15

Ramin Afshar Mahajer and Evelyn Sung, *The Stigma of Inclusion: Racial Paternalism/Separatism in Higher Education*, New York Civil Rights Coalition (2002).....22

Richard A. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP.CT.REV. 12 (1974)..... 7

T. Wood and M. Sherman, *Race and Higher Education: Why Justice Powell's Diversity Rationale for Racial Preferences in Higher Education Must Be Rejected* (National Association of Scholars, 2001).....15

The Stigma of Inclusion: Racial Paternalism/Separatism in Higher Education, Ramin Afshar Mahajer and Evelyn Sung, New York Civil Rights Coalition (2002).....21

William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U.CHI.L.REV. 775 (1979).....14

INTEREST OF AMICUS CURIAE[1]

The Michigan Association of Scholars ("MAS") is the Michigan affiliate of the National Association of Scholars ("NAS"). The educators of the MAS engage in teaching and research in a wide rage of academic disciplines, in social and natural sciences, the arts and the humanities. The common goal of the MAS scholars is the search for *truth* within a scholar's specific discipline.

The MAS scholars share a common concern about the increasing politicization of institutions of higher education. Racial preferences given by the University of Michigan violate the Civil Rights Act of 1964 and the Equal Protection guarantee of the 14th Amendment. More specifically, the MAS argues that the goal racial diversity can never be a compelling state interest to justify the use of racial classifications in admissions policy.

The University's attempts to obscure its violations of the Equal Protection Clause come at an high price. It requires an enormous amount of time, effort, obfuscation and sophistry to camouflage admissions policies that are plainly racist. Indeed, pretending that such policies are not noxious, corrosive, humiliating and illegal – so as to avoid offense and to insure political correctness – is to undermine the University's very first mission: to continue

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

the search for truth and extend Michigan's best traditions of intellectual rigor.

STATEMENT

Petitioners are non-minority students who were denied admission to the University of Michigan ("the University") from 1995 through 1997. Petitioners filed actions against Respondents, claiming that in both the College of Literature, Science and the Arts, and the Law School of the University, race-based admissions policies violated Title VI of the Civil Rights Act, as well as the Equal Protection Clause of the 14th Amendment. The District Courts below split their decisions. In *Grutter* v. *Bollinger*, 137 F. Supp.2d 821 (E.D. Mich. 2001), the District Court found the University's Law School admissions policy violated the Equal Protection clause. Specifically, the Court found that the Law School's asserted need for a diverse student body was not a compelling government interest under the standard of strict scrutiny. In *Gratz* v. *Bollinger*,[2] although the District Court found the race-based system in effect in the undergraduate college when Petitioners originally applied in 1995 was indeed unconstitutional, a revised admissions policy the University adopted after 1995 was found constitutional on the ground that the ethnic diversity it promoted was a compelling interest and was narrowly tailored to the stated need for intellectual diversity in the University.

[2] *Gratz* v. *Bollinger*, 122 F. Supp.2d 811 (E.D. Mich. 2000).

The Sixth Circuit, acting *en banc*, and in a 5-4 ruling, upheld the admission policy of the Law School, but refrained from acting on the undergraduate system.[3] The Sixth Circuit specifically found that, under *Regents of Univ. of Cal. v. Bakke*,[4] the goal of achieving a diverse student body constituted a compelling state interest sufficient to justify the use of racial and ethnic criteria in making admissions decisions.

The University seeks from this Court sanction for its systematic and large-scale uses of racially discriminatory admissions devices for the sake of ethnic diversity. The MAS, working closely alongside Petitioners, seeks from this Court an unambiguous and forceful declaration that racial preference in admission is a violation of Title VI of the Civil Rights Act, is a violation of the Equal Protection Clause of the 14th Amendment, and that under the standard of strict scrutiny such racial discrimination cannot be justified by a quest for diversity in the student body.

SUMMARY OF ARGUMENT

I. The MAS asserts that achieving racial diversity in the university student body can never be a "compelling state interest" sufficient to justify explicit racial discrimination.

II. The MAS also asserts that the racially discriminatory admissions systems of the University do not, in any event,

[3] *See, Grutter* v. *Bollinger*, 288 F.3d 732 (6th Cir. 2002).

[4] *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

substantially advance intellectual diversity, nor do race-based programs contribute to the central aim of the University – the pursuit of truth.

III. The MAS further asserts that, under the Equal Protection Clause, "academic freedom" does not license or conscience racially discriminatory conduct.

IV. The MAS contends that the racial preferences of the University are immoral and totally unacceptable in a democratic society.

V. The MAS concludes that racial preferences in admissions engender tension and racial hostility on the University campus.

ARGUMENT

I. CREATING A DIVERSE STUDENT BODY CAN NEVER BE A COMPELLING STATE INTEREST.

The central contention of the Michigan Association of Scholars, as a friend of this Court, is that the creation of a racially diverse student body *can never be a compelling state interest* in the light of the Equal Protection Clause of the U.S. Constitution.

A. State Interest Is "Compelling" When the Furtherance of that Interest Protects Those Principles Which Lie at the Heart of Ensuring Our Nation Stays Free, Open and Democratic Governed Under the Rule of Law.

Surprisingly, there is no case law defining conceptually or providing factors which define a state interest as

"compelling." Rather, a "compelling state interest" appears to be used by the courts as a "term of art."[5] Nonetheless, Supreme Court precedents suggest a conceptual framework for determining when a state's interest is compelling.

Under the Court's constitutional analysis, the State need only bear the heavy burden of advancing a "compelling state interest" when the state is restricting a citizen's exercise of *fundamental* rights guaranteed to the citizen under the Constitution. When viewed in light of our nation's history, traditions and law, the only interests a state may advance as compelling to justify prohibiting a citizen's exercise of a right guaranteed to the citizen under the Constitution are those interests which protect either governmental or societal structures or principles *absolutely* needed to ensure the state remains able to govern as a free, open and democratic government and that its citizens are likewise able to fully exercise their fundamental rights under the U.S. Constitution. Only when the citizen's exercise of his or her fundamental rights in fact jeopardizes governmental or societal structures or principles *absolutely* needed to ensure the state remains able to govern as a free, open and democratic government must the citizen's fundamental rights yield to the state.

This analysis harmonizes our constitutional history because a citizen's ability to exercise his or her fundamental rights is meaningless unless a government is able and willing to guarantee the exercise of such rights *by force*. Thus, the only interest which should be sufficiently

[5] *See, Quilter v. Voinovich*, 912 F.Supp. 1006, 1019 (N.D. Ohio 1995) (dicta) (reversed on other grounds).

compelling to allow a state to override a citizen's fundamental rights is an interest that is logically and necessarily connected to the state's ability to guarantee other rights.

For instance, American citizens have a fundamental right to speak freely during an election campaign. However, because voter intimidation and election fraud nullify other rights that are guaranteed to citizens, the state has a sufficiently compelling interest to restrict certain kinds of speech (election campaigning) within 100 yards of a polling place.[6] Similarly, while a citizen has a right to equal protection of the law, states may override this right in order to remedy a specific instance of past discrimination.[7]

Moreover, the MAS argues that any compelling interest recognized by this Court must be anchored to *our nation's* history, traditions and laws. One certainly can make the intellectual argument that prior government restraint which forbids the publication of official secrets would be a "compelling state interest." In fact, our philosophical cousin, Great Britain, claims just such an interest. Great Britain has an Official Secrets Act that prohibits publication of such national security secrets. Yet, this is not our history. The struggle for a free press animated our break with Great Britain, as it gives life today to the First Amendment. Our history, traditions and laws make clear that prior restraint of the press is not a "compelling state interest," in the United States, even if it

[6] *See, Burson v. Freeman,* 504 U.S. 191 (1992).

[7] *See, City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

might be considered "logical" or "compelling" in other places on the globe.[8]

As detailed below, any interest the State of Michigan may have in diverse student body is not an interest that is rooted in our nation's history, traditions or laws.

To the contrary, the State of Michigan sacrifices (and proposes to continue sacrificing), for the sake of diversity, those things that are deeply rooted in our tradition and law. While our founding documents declare that "all men are created equal," and the states loyal to the Union waged a bloody Civil War in order to end slavery, the University turns away from the struggle for racial equality, in order to extend, in modern times, racial and ethnic bias.

[8] *See, New York Times Co. v. U.S.*, 403 U.S. 713 (1971). MAS emphasizes that it is important for the law to anchor any analysis identifying a "compelling state interest" under the Equal Protection Clause in our nation's history and not simply leave it untethered and subject to passing ideologies and fads which catch the attention of the judge hearing the case. As Judge Richard Posner has stated:

> the proper constitutional principle [under the equal protection clause] is not, no "invidious" racial or ethnic discrimination, but no use of racial or ethnic criteria to determine the distribution of government benefits and burdens. . . . To ask whether racial exclusion may not have overriding benefits for both races in particular circumstances is to place the antidiscrimination principle at the mercy of the vagaries of empirical conjecture and thereby free the judge to enact his personal values into constitutional doctrine.

Richard A. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities,* 1974 SUP.CT.REV. 12 (1974) at 25-26.

B. Government Mandated Racial Diversity Can Never Be a Compelling State Interest Under the Equal Protection Clause.

The People of the United States added the 14th Amendment to the U.S. Constitution, in the wake of the Civil War, so as to ensure that black citizens would not be denied equal protection of the laws. The central purpose of the Equal Protection Clause of the 14th Amendment "is to prevent the States from purposefully discriminating between individuals on the basis of race."[9] The Equal Protection Clause ultimately seeks to render the issue of race irrelevant in governmental decision-making.[10]

> "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality" before the law; therefore "racial discriminations are in most circumstances irrelevant and therefore prohibited. . . . "[11] "[P]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids."[12]

Most importantly to this matter, this Court recently has made unequivocally clear that while the Equal Protection Clause was adopted in the wake of the Civil War to

[9] *See, Shaw v. Reno,* 113 S.Ct. 2816, 2824 (1993) (citing *Washington v. Davis,* 426 U.S. 229, 239, 96 S.Ct. 2040, 2047 (1976)).

[10] *See, Palmore v. Sidoti,* 466 U.S. 429, 432 (1984).

[11] *See, Hirabayashi v. United States,* 320 U.S. 81, 100 (1943).

[12] *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 98 S.Ct. 2733 (1978) (opinion of Powell, J.); *see also Loving v. Virginia,* 388 U.S. 1, 11 (1967); *Brown v. Board of Educ.*, 347 U.S. 483, 493-94 (1954).

ensure that blacks were treated equally under the law, the Clause applies to each and every American citizen regardless of their race or ethnic origin.[13] Thus, this Court has also made unequivocally clear in evaluating any governmental action that expressly distinguishes between persons on the basis of race, the Court will use the most exacting scrutiny even if the proponents of the distinction characterize the classification as "benign" or "remedial."[14]

Finally, in bearing its burden of demonstrating a "compelling state interest," the State may not rely on "assertion and conjecture" – rather, the State must provide objective evidence demonstrating that the interest is compelling.[15] "Social scientists may debate how peoples' thoughts and behavior reflect their background, but the Constitution provides that the government may not allocate benefits or burdens among individuals based on the assumption that race or ethnicity determines how they act or think."[16] To hold otherwise would, as Judge Posner stated, subject fundamental rights guaranteed to citizens

[13] *See, Adarand Constructors v. Pena,* 515 U.S. 200 (1995). This thrust of the constitution is important. The Equal Protection Clause was not adopted to "help," "pull up," "improve" or "equalize the quality of the lives of" black citizens. Rather, it was adopted to ensure that black citizens would be treated no differently than any other citizen in the eyes of the law. It follows from this high purpose that no citizen – of whatever race or ethnicity – may be treated differently in admissions, for example, by an arm of the state, because of race or ethnicity.

[14] *See, e.g., Loving,* 388 U.S. at 11.

[15] *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 841 (1978).

[16] *See, Metro Broadcasting, Inc. v. F.C.C.,* 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting).

under the Constitution to the "mercy of empirical conjecture" and thus constant abuse.

The scholars of the MAS, including senior members of the faculty of the University of Michigan itself, find the claims that racial diversity is central, essential, and indispensable to be false. These scholars know from long and varied experience that, even where diversity in their classrooms is a genuine merit, it is simply not the case that their work, their teaching, their research, cannot go forward successfully in its absence. The MAS notes that many great institutions of higher learning in Great Britain, in Germany, and most notably in Japan, pursuing their intellectual missions with dedication and vigor, have met with intellectual success and high achievement with student bodies that would not be considered "diverse" by the standards used by the University of Michigan. American society is different from these societies, no doubt – but the nature of intellectual work in the sciences and in the humanities is not so different to say that diversity is somehow a prerequisite for educational excellence.

The MAS denies, categorically, that racial diversity is central to their work as scholars. The MAS denies, categorically, that racial diversity is essential for research or for effectiveness in teaching. The MAS denies, categorically, that racial diversity is indispensable to the search for truth, which is the truly central task of our institutions of higher learning – truth that does not fluctuate with race or color or national origin. The Michigan Association of Scholars asks that this Court recognize that the University, in claiming that racial diversity is a compelling need of the state, is exhibiting that same distortion of the truth.

II. EVEN IF THE CLAIMS OF THE UNIVERSITY FOR THE VALUE OF RACIAL DIVERSITY HAD SOME MERIT, SUCH DIVERSITY DOES NOT CONSTITUTE A COMPELLING DEMAND UPON THE STATE.

The MAS has said that racial diversity does not have the huge role in the educative process claimed for it by the University. However, MAS's objection to the University argument is yet more penetrating. Being fully aware of the importance of fine scholarship, the MAS also insists that even if it were true that racial diversity had a significant role in university research and teaching, that role could not constitute a compelling need of the state.

A. Student's Race Contributes Nothing to the University's Pursuit of Truth.

The MAS is not blind to the (marginal) advantages of ethnic diversity in our classrooms. With students equally diligent and curious and quick, it is better in many contexts (although not in all contexts) that students be varied in their cultural backgrounds. However, the notion that the marginal benefits such ethnic variety can bring in some few circumstances are to be treated as critical, constitutional and morally compelling needs of the state, overriding the plain intent of the Civil Rights Act of 1964 and the Equal Protection Clause, and overriding the demands of the most fundamental principles of moral fairness is a wholly untenable claim.

First, the race of a student, standing alone, has nothing whatever to do with learning or with truth. The University argued, in *Grutter*, that the Law School's commitment to diversity was not intended as a remedy for

past discrimination, but as a means of including students who may bring a different perspective to law school classes. But neither the University offered, nor did the Sixth Circuit cite, any objective evidence (required under strict scrutiny) to support the conclusion that individuals of different colors actually bring different experiences and perspectives that are essential to the research of or the teaching of the university. There is nothing in the record, and nothing that may be drawn from normal human experience, that would demonstrate that a person's race or ethnicity, taken by itself, would contribute anything significant to the learning process. To suggest that it would do so is, in fact, well-meaning racism.

Second, while the MAS certainly agrees that individuals of certain races or ethnicities may have experiences and perspectives that are different from those of students of other races or ethnicities, the MAS also recognizes that those individuals may not have experiences and perspectives that are different from other students. If, for the sake of better learning, there are certain perspectives and experiences that the University thinks valuable, the University can seek directly to enroll individuals who possess these special experiences and perspectives, rather than relying upon race or ethnicity as a proxy for their possession.

Third, there is no evidence that specifically links a student's race or ethnicity to any factor that is intellectually material to the advancement of learning, or to the University's pursuit of truth. The University's claims in this regard are entirely conjectural and without evidentiary support. The University maintains that its program of racial and ethnic preferences "has made the University of Michigan Law School a better law school than it could

possibly have been otherwise" because it includes students "who may bring to the law school a perspective different from that of members of groups which have not been the victims of such discrimination." However, the University *presumes* that Ms. Grutter, because she is white, has not been the victim of discrimination and *presumes* that those who were favored over her despite their much lower scores were the victims of such discrimination. To pass judgment on persons knowing nothing about them but their race or ethnicity is the plainest form of racial prejudice. In fact, the University readily admits that if Barbara Grutter were black instead of white she surely would have been accepted to the Law School.[17]

B. The Rationale Proffered by the Law School Is Internally Inconsistent.

The University asserts that there are no archetypical minority viewpoints.[18] But while asserting this the University insists upon employing an admissions process that assumes that the viewpoints of applicants largely follow their skin color.[19] Regrettably, the law students at Michigan, and other like schools, are hampered in their

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[17] *See, Grutter*, 288 F. 3rd at 775, 790 (Boggs, dissenting).

[18] That is one of the justifications given for the need for a "critical mass" of minority students. *See Grutter*, 137 F.Supp., at 836. ("Dean Syverud also indicated that when a critical mass of minority students are present, racial stereotypes are dismantled because non-minority students see that there is no "minority viewpoint"; they see, in other words, that there is a diversity of viewpoints among minority students.")

[19] *See, id.*, at 849 ("The connection between race and viewpoint is tenuous, at best").

absorption of the first of these assertions, which is true, by the University's real-life reliance upon the second, which is false. The Law School cannot hope to confront racial prejudice successfully by practicing it.[20]

The long experience of the many members of the Michigan Association of Scholars leads them to the firm conclusion that admitting students because of their race or ethnicity is neither a reliable nor a productive route to the "livelier, more spirited and simply more enlightening" class discussion sought by the University of Michigan.[21] Indeed, MAS members assert that in almost every discipline the racial or ethnic backgrounds of students contribute little or nothing to classroom discussion or learning. In the study of the sciences, for example, while diverse *intuitions, ideas* and *approaches* can lead to the discovery or grasp of natural laws and principles, the ethnic or racial background of the students neither enhances nor diminishes the academic experience. All are welcome to the scientific endeavor without regard to ancestry or skin

[20] As Professor William Van Alstyne has stated:

> [O]ne gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment *never* to tolerate in one's own life – or in the life or practices of one's government – the differential treatment of other human beings by race. Indeed, that is the great lesson for government itself to teach: in all we do in life, whatever we do in life, to treat any person less well than another or to favor any more than another for being black or white or brown or red, is wrong. Let that be our fundamental law and we shall have a Constitution universally worth expounding.

William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U.CHI.L.REV. 775, at 809-10 (1979).

[21] *See, Grutter*, 137 F. Supp. at 849.

color. The same can be said of the study of philosophy, chemistry, classics, and mathematics. The hoped-for diversity lies in the range of *ideas*. When the focus is upon ideas and arguments themselves, and upon the worth of those ideas and the reliability of those arguments when held up to careful scrutiny, the ethnic composition of the student body is largely irrelevant.[22]

C. The University Has Not Sustained Its Evidentiary Burden of Establishing that Its Interest in Racial Diversity is *Compelling*.

The evidence the University has sought to compile regarding the contributions made by diversity is largely conjectural, inconclusive and of doubtful worth. But even if its worth were undoubted, the University's burden would still be sustained. None of its supposed evidence establishes, or can claim to establish, a compelling interest that outweighs the claims of racial justice obliged by the Equal Protection Clause.

[22] Indeed, when it applied multivariate regression analysis to the same database employed by the University of Michigan, the National Association of Scholars has "disconfirmed the claim that campus racial diversity is correlated with educational excellence." *See,* T. Wood and M. Sherman, *Race and Higher Education: Why Justice Powell's Diversity Rationale for Racial Preferences in Higher Education Must Be Rejected*, at 58 (National Association of Scholars, 2001). Further, NAS is not alone in its conclusion. Two other economists, Harry Holzer and David Neumark, whose work had previously exhibited sympathy for racial preferences, emerged with this damning conclusion following their review of the University's evidence: "There is no evidence of the positive (or negative) effects of a diverse student body on educational quality." H. Holzer and D. Neumark, Assessing Affirmative Action, *Journal of Economic Literature*, Vol. 38, No. 3, p. 559 (Sept. 2000).

One example of this failure is illustrative: In an effort to quantify the educational benefits of diversity, the University solicited and then issued a report written by Patricia Gurin, a Professor of Psychology at the University of Michigan. Professor Gurin sought to correlate the racial diversity of classrooms on the one hand with hundreds of educational outcomes on the other. Among her results was the conclusion that students' self-reported intellectual self confidence improved more sharply in classrooms where there was greater racial diversity. But only by wading through pages of regression tables will one find the fact (not much emphasized by the University!) that student self-reported intellectual self confidence in racially mixed classrooms increased for *white* students. For *black* students Prof. Gurin found either no correlation or a negative correlation. Black student self-confidence, according to Prof. Gurin, either did not improve, or it declined in more racially mixed classes.[23]

As the University would have it, the University is justified in abandoning normal admissions criteria so as to boost the number of black students in order that white students (but not black students) may feel more self-confident. Whether this shows a need for diversity at all is

[23] *See*, "Expert Witness Report of Patricia Y. Gurin." 15 December 1998, Appendix D, Table D-1 (white students) and Table D-2 (black students). According to Table D-1, the raw correlation between "classroom diversity" and student self-reported "intellectual self-confidence" for white students was (.031). According to Table D-2, the raw correlation between "classroom diversity" and self-reported black self-confidence was (-.049). Classroom diversity (on this account) partly explained an increase in "intellectual self-confidence" for white students and partly explained a *drop* in intellectual self-confidence for black students.

arguable; that it shows a compelling need for diversity is absurd.

Because the evidence demonstrates that the University of Michigan's use of an applicant's race as a proxy for his or her viewpoints is internally inconsistent, indirectly a form of racism itself and immaterial to the search for truth, the claim that student diversity is an interest so compelling that it justifies racially discriminatory admissions cannot be seriously maintained.

III. "ACADEMIC FREEDOM," CANNOT SERVE AS A SWORD TO ENGAGE IN OUTRIGHT DISCRIMINATION BY RACE IN UNIVERSITY ADMISSIONS.

The original impetus for the use of racial diversity in the student body as a compelling state interest justifying a state's use of race in admission selection criteria was Justice Powell's finding in *Bakke* that "academic freedom" is a "countervailing constitutional interest" to the student's interest in equal protection. Thus, in *Bakke*, when the University of California at Davis baldly asserted without evidence that its educational mission required a racially diverse student body, Justice Powell found that Davis' "academic freedom" to make this decision was a "countervailing constitutional interest" under the First Amendment, an interest that had to be "balanced" against Mr. Bakke's right to have his enrollment application evaluated without regard to race.[24] Using "academic freedom" as a criterion for selection of students is not a

[24] *See, Bakke*, 438 U.S. at 313-14.

"countervailing constitutional interest," and it was not that at the time of *Bakke*.

Straining to find a "countervailing constitutional interest" in academic freedom that might undergird the need for diversity, Justice Powell relied on *Sweezy v. New Hampshire*,[25] and *Keyishian v. Board of Regents*.[26] The argument has little merit, since neither *Sweezy* nor *Keyishian* held that "academic freedom" was any kind of fundamental right to be balanced against other rights. Moreover, the facts and law in each of those cases did not touch on the rights or needs of the universities involved, but rather the right of individual professors to exercise academic freedom grounded in their First Amendment right to free speech. Both cases, in dicta, spoke of the value our society places on academic freedom in the university and the importance of a free and searching inquiry at the academy – but this language could not transform "academic freedom" into a sword for the University, as a state actor, to violate the rights of individuals to equal protection of the laws.

Sweezy involved a McCarthy-era claim against a professor who failed to answer a court order to deliver lecture notes that would reveal the professor's communist sympathies. The Court found that the contempt citation (which it reversed) touched on the *professor's* First Amendment right to free speech and free association. *Keyishian* similarly involved a New York sedition law aimed at university professors who were "disloyal" to the

[25] *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957).

[26] *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

State. Again, the New York law was struck down because it violated the *professor's* First Amendment right to free speech and free association.

Academic freedom is a treasured principle in the life of universities and their members, to be sure. It safeguards the integrity of scholars and the open and robust exchange of ideas in the academic environment. The Michigan Association of Scholars is deeply loyal to this ideal and is as tenacious in its defense. But the MAS scholars do not suppose that their academic freedom gives them, or the State of Michigan, license to act in ways that are blatantly discriminatory, subversive of the deepest constitutional principles, and patently violations of Federal law.

IV. THE UNIVERSITY'S USE OF RACE AND ETHNICITY IN THE ADMISSIONS PROCESS IS IMMORAL.

The officers of the University of Michigan are honorably motivated. And yet they say bluntly that they are entitled to discriminate by race, in ways of their choosing, to improve the intellectual setting of the campus. Their claim that ethnic preferences do indeed improve learning and teaching is an empirical one – and is vigorously disputed by MAS and others – yet, most Michigan residents, and most thoughtful Americans, would agree that even if those educative claims were true, the enrichment of the campus environment cannot justify discrimination by race. Race-based admissions policies are a moral disgrace.

However desirable diversity in the classroom may be, when achieved by the use of a racially discriminatory admissions system it comes at much too high a price. Our

social order is built on a shared understanding that laws and the judicial system will treat each individual the same as every other similarly situated individual and that each individual will be judged on the particular merits of his or her individual circumstances. Race preference proceeds on the corrosive principle that individuals may be judged not entirely by their individual merits, but in good part by their race.

The principle that all persons are equal lies close to the heart of a democratic polity. If that principle is to be realized in practice, there must be no racial discrimination by the state in the exercise of its authority. The Goddess of Justice is rightly blindfolded; the Equal Protection Clause is rightly central in a just society. The race preferences defended by the University undermine the highest of American ideals.

A simple thought experiment will confirm this. Suppose that the trial courts in *Grutter* and *Gratz* had determined that there was strong evidence that segregated classrooms improve learning and teaching at the University of Michigan.[27] Suppose further that the data in support of segregating students by race were very impressive, far more impressive than the materials offered by the University in support of the alleged benefits of diversity. Would we think such evidence, even if reliable, constituted

[27] The argument seems absurd to us now, but in the defense of segregated schools by respondents in *Brown v. Board of Education,* 347 U.S. 483 (1954), a great deal of substantial evidence, unacceptable now but persuasive then, was submitted by the States in supporting their claim that segregation was really very good for us – good for whites and good for blacks too!

a justification for the deliberate segregation of university classes or activities? Of course not. However strong the evidence of its benefits, men and women of principle would insist that segregation by race, imposed by the state, is simply unacceptable. The advantages that may flow from it (MAS would say) could never begin to justify a policy that is intrinsically immoral and unjust.

And so it is with this case at bar. It is unjust to give advantages or impose burdens on the basis of skin color – even if doing so had some benefits, and even if that racial discrimination were honorably motivated. Racial discrimination is wrong; no benefits alleged to flow from diversity on the campus or in the classroom can make it right.

V. THE UNIVERSITY'S USE OF RACE AND ETHNICITY IN THE ADMISSIONS PROCESS ENGENDERS RACIAL TENSION AND HOSTILITY.

The ethnic splintering of campus life is one plain result of educational institutions that continually re-emphasize and reinforce racial and ethic distinctions among students and faculty. MAS finds the recent penetrating survey *The Stigma of Inclusion: Racial Paternalism/Separatism in Higher Education,* Ramin Afshar Mahajer and Evelyn Sung, New York Civil Rights Coalition (2002) disturbing and very instructive. In this report, the New York Civil Rights Coalition concludes that "[t]he same schools that use race as a factor to achieve inclusionary admissions will also permit its use as a factor in the selection of roommates, preferences for living quarters in campus housing, for scholarships, and even for the

remediation and counseling of 'at risk' students" until "[r]ace and ethnicity considerations permeate almost every facet of campus life."[28] The report details how, in the 32 undergraduate institutions it surveyed, colleges had increasingly made certain course offerings available only to minority students; had segregated students along color lines through race-based housing; had obliged "diversity training" as a condition of graduation; and had instituted separate graduation ceremonies of those of the several races. The ethnic fences established and authorized in the admissions process engender, and then reinforce a host of race-conscious campus programs. Race-based "diversity" policies fracture the very communities that the proponents of these policies claim will be drawn together and enriched.[29]

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[28] Ramin Afshar Mahajer and Evelyn Sung, *The Stigma of Inclusion: Racial Paternalism/Separatism in Higher Education,* New York Civil Rights Coalition (2002) at p. 3.

[29] *See also, Adarand Constructors v. Pena*, 515 U.S. 200, 241 (Thomas, J., concurring) ("Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race").

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Sixth Circuit should be reversed.

Respectfully Submitted,

WILLIAM F. MOHRMAN
Counsel of Record
ERIC L. LIPMAN
MOHRMAN & KAARDAL, P.A.
33 South Sixth Street
Suite 4100
Minneapolis, MN 55402
(612) 341-1074
Counsel for Amicus Curiae

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